FILE COPY

In the Supreme Court

OF THE

United States

October Term, 1965

No. 748

[illegible] PALERMO,

Petitioner,

vs.

STOCKTON THEATRES, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California.

[illegible] E. MACGUIRE,

[illegible]

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Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No.

EMIL PALERMO, *Petitioner,*

vs.

STOCKTON THEATRES, INC., a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on December 19, 1958.

OPINIONS BELOW.

The Opinion of the Supreme Court of the State of California is officially reported in 51 A.C. 347, 333

Pac. 2d 10. This Opinion and the Judgment of the Court are printed in Appendix A infra, pages 1-16.

A prior Opinion of the Supreme Court of the State of California in regard to the same matter is officially reported in 47 Cal. 2d 469, 304 Pac. 2d 7, and is printed in Appendix B infra, pages 17-32.

The Decision of the Third District Court of Appeal is unofficially reported in 159 A.C.A. 602, and is printed in Appendix C infra, pages 33-41.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED.

1. After the California Supreme Court has interpreted a statute and held that it applies in the case at bar and, as a matter of law, the effect thereof could only result in an affirmance of the trial Court's Judgment, can the California Supreme Court completely disregard the statute?

2. Where a party's rights are completely dependent upon a statute as construed by the State Supreme Court, can that Court deprive a party of his rights by completely ignoring the statute?

3. Can a State Supreme Court completely disregard a State Constitutional provision and all prior

precedent and apply a new, arbitrary, completely different standard to reverse a trial court's Judgment?

STATUTE INVOLVED.

The statute involved is Section 946 of the Code of Civil Procedure of California.

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved is Article VI, Section 4, of the Constitution of California.

STATEMENT OF THE CASE.

Emil Palermo owned a theater building in Stockton, California, which he leased on a long-term lease to a corporation whose stock was almost wholly owned by Japanese aliens. The Attorney General of California had threatened both Palermo, the landlord, and the tenant with escheat proceedings under the Alien Land Act. Palermo, knowing that the Alien Land Act had at least twice been held constitutional by this Court and that the Panay incident had occurred and as a result thereof the Government of the United States unilaterally terminated its commercial treaty with Japan; and that at that time it was clearly established by decisions of this Court that Japanese Nationals

could lease commercial property only by virtue of the Treaty; and that Palermo was in grave danger of having his real property escheat to the State of California, brought an action for declaratory relief in the State court. The trial judge held that the lease was unlawful and constituted a clear violation of the Alien Land Act.

The war between Japan and the United States terminated and this Court decided the *Takahashi* case. The California Supreme Court reversed the trial Court and held the Alien Land Law unconstitutional. In the meantime, pursuant to the trial Court's decision of unlawfulness, Palermo regained possession of the theater and operated the same as a going business. The alien Japanese held Corporation, Stockton Theatres, Inc., sued Palermo for restitution of all profits made by Palermo from operating the theater after the Judgment of the trial Court until the date of the reversal by the State Supreme Court. Stockton Theatres' suit was for $130,000.00 against Palermo and it attached Palermo's real and personal property. The trial Court awarded Stockton Theatres the sum of $13,658.7[illegible]. In order to continue the attachment while the case was on appeal, Stockton Theatres had to comply with a statute—Section 946 of the Code of Civil Procedure of California—which provides that in order for said attachment to be continued in force on appeal, the appeal must be perfected within five (5) days after written notice of the entry of the order appealed from. The sole evidence, taken from the files of the action, showed that written notice of the entry of the Judg-

ment appealed from was given by Palermo to Stockton Theatres on April 27, 1951, and that the appeal was not perfected by the filing of a Notice of Appeal until June 7, 1951—forty-one (41) days thereafter, or 36 days too late to continue the attachment in force.

On appeal, the Appellate Court granted Stockton Theatres $32,333.37 additional. Palermo paid all Judgments against him immediately upon said Judgments becoming final. Stockton Theatres filed a cost bill on appeal that asked that it be allowed as costs on appeal the sum of $6,980.49 representing the premium on a surety bond on appeal in the amount of $232,682.50 obtained to continue the attachment in force pending decision on appeal. The trial Court disallowed in total the bond premium on appeal. Stockton Theatres appealed the trial Court's decision to the State Supreme Court. The State Supreme Court held that Section 946 of the California Code of Civil Procedure did apply to this case and that it was a question of fact for the trial Court to determine as to whether the bond on appeal was necessary, and the State Supreme Court sent the case back to the trial Court for a determination of fact by the trial Court as to whether the bond on appeal was necessary.[1] The trial Court then held a hearing and took evidence and determined as a fact that the bond on appeal was *not* necessary. Stockton Theatres appealed from this judgment of the trial Court and the Third District Court of Appeal upheld the trial Court and stated

[1] *Stockton Theatres v. Palermo*, 47 Cal. 2d 469, 304 Pac. 2d 7.

that this was a determination solely of a question of fact and that that question of fact, under all prior decisions of the Appellate Courts of California, was for the determination of the trial Court and there was sufficient evidence in the record to support the trial Court's determination of that factual matter. The State Supreme Court granted a hearing, and in an opinion by a divided Court—three (3) Judges dissenting—disregarded the trial Court's findings on the question of fact issue and itself made findings of fact completely at variance with the Judgment of the trial Court. The State Supreme Court likewise completely avoided Palermo's invocation of Section 946 of the Code of Civil Procedure and reversed the trial Court and directed the trial Court to allow the premiums on the bond as a cost on appeal.

Palermo petitioned the State Supreme Court for a rehearing (a copy of said Petition is printed in Appendix D, infra, pages 43-54), in which Petition for Re-Hearing Palermo argued that the State Supreme Court, in reversing the trial Court in the instant case, had struck down Article VI, Section 4, of the Constitution of the State of California and a long series of decisions of the California Supreme Court establishing precedent in this, that that Court has repeatedly held that it was not a fact-finding body and that the State Supreme Court would not substitute its judgment on the facts for that of the trial Court, and further argued that such State action was arbitrary and capricious and deprived Palermo of the equal protection of the laws and of due process under both

the State and Federal Constitutions. Palermo likewise argued in his Petition for Re-Hearing that by virtue of its failure to comply with C.C.P. 946 Stockton Theatres had no right whatsoever under the statute and the decisions of the California Supreme Court to continue in force the attachment on appeal in this case; that the California Supreme Court should have upheld the statute and the prior decisions of the State Supreme Court on that point, and the action of a majority of that Court in ignoring this statute deprived Palermo of his rights under the State statute and the deprivation of this right constituted an invasion by the State Supreme Court of Palermo's right to due process and the equal protection of the laws under both the State and Federal Constitutions.

V

ARGUMENT.

REASONS FOR GRANTING THE WRIT.

Up until the time that the Supreme Court of California reversed the trial Court in its decision of December 19, 1958, Palermo did not and could not have had the slightest inkling that the California Supreme Court would depart from all prior established precedent and set itself up as a trier of the facts de novo. Palermo could not have anticipated that the Supreme Court of California would do such a thing, and as soon as the California Supreme Court did disregard all prior established precedent and did disregard the provisions of Art. VI, Sec. 4 of the Constitution of California, Palermo immediately called the California

Supreme Court's attention in his Petition for Re-Hearing to the fact that such State action was an invasion by that Court of his right to due process and the equal protection of the laws under both the State and Federal Constitutions.

Nor could Palermo anticipate that the California Supreme Court would, in its endeavor to strike down the decision of the trial Court, completely disregard Palermo's rights under Section 946 of the Code of Civil Procedure of California as construed by the State Supreme Court, and as soon as Palermo became aware that a majority of the California Supreme Court had deprived him of the benefit of said statutory enactment, Palermo immediately by Petition for Re-Hearing called the California Supreme Court's attention to this matter and that the action of the State Court in depriving Palermo of his right under the clear terms of the statute was an invasion by the State Court of Palermo's right to due process and the equal protection of the laws under both the State and Federal Constitutions.

Palermo had brought the statute to the attention of the trial Court, the Third District Court of Appeal, and the State Supreme Court on every possible occasion, and both the Third District Court of Appeal and the California Supreme Court in its last two decisions chose to completely disregard Palermo's right to the benefit of the statute.

The California Supreme Court has held in decision after decision that an appellate court's function begins and ends with determination as to whether or

not there is any substantial evidence which will support findings of the trier of fact. See:

Guardianship of Kentera, 41 Cal. 2d 639, 262 Pac. 2d 317;

Holmberg v. Marsden, 39 Cal. 2d 592, 248 Pac. 2d 417;

Martin Sch. of Aviation v. Bank of America, 48 Cal. 2d 689, 312 Pac. 2d 251;

and a long list of cases all to the same effect cited in Appeal and Error, 4 Cal. Jur. 2d, page 482, Par. 602 and 1958 Cumulative Supplement to that volume.

And its departure from all prior precedent and established law is violative of the due process clause of the Fourteenth Amendment. See:

National Asso. for the A.C.P. v. Alabama, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163.

The Legislature of California has determined that there is only one way in which an attachment can be continued in force on appeal, and that is under Section 946 of the Code of Civil Procedure.[2] That Section specifically provides that in order for an attachment to be continued in force on appeal, the appeal

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[2]Section 946 of the Code of Civil Procedure, so far as material here, provides as follows:

"• • • An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected."

must be perfected within five (5) days after written notice of the entry of the order appealed from. In this case the record shows, that written notice of the entry of the Judgment appealed from was given by Palermo to Stockton Theatres on April 27, 1951, and the appeal was not perfected by the filing of a Notice of Appeal until June 7, 1951—forty-one (41) days thereafter. It is abundantly clear that under the statute as interpreted by the State Supreme Court in this case, and as a matter of law, Stockton Theatres had no right whatever to continue in force the attachment on appeal in this case. When in the decision of the Supreme Court of California in 47 Cal. 2d 469 it determined that Section 946 of the Code of Civil Procedure meant exactly what it said, that Court should never have sent the case back to the trial Court at all. It should have concluded as a matter of law that since Stockton Theatres had not complied with C.C.P. 946 and could not have continued in force its attachment on appeal, that any bond given by Stockton Theatres to continue in force an attachment on appeal was an idle useless act and a nullity, and the California Supreme Court should have determined that the bond on appeal was unnecessary as a matter of law and should have, in that decision, affirmed the Order of the trial Court on that basis alone.

There is another point upon which Palermo has been deprived of the equal protection and due process clauses contained in the Fourteenth Amendment, and that point is pointed up in the Dissenting Opinion of the California Supreme Court's decision of December

19, 1958, by Judge Schauer, concurred in by Judges Shonk and McComb.

There is still another point upon which Palermo has been deprived of the equal protection and due process clauses of the Fourteenth Amendment and that is this: That at the time the cost of the premium on the bond on appeal was incurred, the statutes of California did not permit the recovery thereof as an item of costs. This statute was enacted subsequently and the State Supreme Court held that the statute operated retroactively. Palermo submits that this statute was not one of procedure but was one of substance.

CONCLUSION.

In the interests of justice, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated, Stockton, California,
January 28, 1939.

FORREST E. MACOMBER,
Counsel for Petitioner.

CHARLES A. ZELLER,
Of Counsel.

(Appendices Follow.)

Appendix A

(Vol. 51 A.C. 347.)

[Sac. No. 6829. In Bank. Dec. 19, 1958.]

STOCKTON THEATRES, INC. (a corporation), Appellant, v. EMIL PALERMO et al., Respondents.

[On hearing after decision by the District Court of Appeal, Third Appellate District, Civ. No. 9312 (159 A.C.A. 602, 323 P.2d 1039) affirming order of the superior court. Order reversed with directions.]

[1] Attachment—Proceedings in Principal Action—Appeal.—Inasmuch as Code Civ. Proc., § 946, specifically states that an appeal does not continue in force an attachment unless an undertaking be executed and filed on appellant's part by at least two sureties in double the amount of the debt claimed by him, a determination of the trial court, after taking evidence, that such bond was unnecessary "for the preservation of the attachment on appeal" must be construed to mean that the bond was unnecessary because of defendant's financial standing.

[2] Costs—Items Allowable—Bond Premiums.—Under Code Civ. Proc. § 1035, permitting the premium on any surety bond to be included as an item of costs to the party to whom costs are allowed "unless the court determines that the bond was unnecessary," the Legislature by using the word "was" declared its intention that the necessity for the bond be measured as of the time of perfecting the appeal.

[3] Id.—Items Allowable—Bond Premiums.—Where it appeared that, though the judgment debtor testified that money had been removed from a Nevada safety deposit box and "returned to the State of California," no bank account owned or controlled by him reflected it, and where he testified that he did not "believe" he had ever deposited the money in a

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[1] See **Cal.Jur.2d**, Attachment and Garnishment, § 105.
McK. Dig. References: [1] Attachment, § 55; [2, 3] Costs, § 36.
[2] See **Cal.Jur.2d**, Attachment and Garnishment, § 105.

California bank, that he continued to carry money in accounts in his incompetent brother's name so as to avoid attachments, that neither of these accounts contained sufficient funds to protect plaintiff theatre corporation, the judgment creditor, had it recovered the sum claimed to be due it, that the judgment debtor owned only a one-story brick building with an estimated value of $10,000, that he admitted he removed his money to Nevada to "protect" it, that he carried other money in his brother's name to avoid attachment from any source, and that he sold all the theatre equipment, furnishings, etc., to another person, the corporate surety bond procured by plaintiff was necessary, as a matter of law, to continue in force the attachment on appeal within the meaning of Code Civ. Proc., § 1095.

APPEAL from an order of the Superior Court of San Joaquin County refusing to allow as costs on appeal the amount of the premium on a bond to preserve attachments pending appeal. George F. Buck, Judge. Reversed with directions.

Freed & Freed and Eli Freed for Appellant.

Smith & Zeller and Charles A. Zeller for Respondents.

CARTER, J.—This is an appeal by plaintiff from an order refusing to allow as costs on appeal the amount of the premium on a bond to preserve attachments pending appeal.

This is part of a long line of litigation which, it will be recalled, began when Emil Palermo, the owner and lessor of the Star Theater in Stockton, brought an action for declaratory relief against the lessee, Stockton Theatres, Inc., in an endeavor to have the lease declared void because the stockholders of the lessee were Japanese nationals. This court reversed the trial

court (*Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53 [195 P.2d 1]) holding that the lease was valid and that under it, Stockton Theatres was entitled to possession of the theater as tenant thereof. Stockton Theatres then brought an action for restitution, and after trial, in which plaintiff was held entitled to recover from Palermo the sum of $13,658.75, both parties appealed. Plaintiff prevailed on its appeal and the judgment of the lower court was modified to provide that Stockton Theatres recover the sum of $45,992.12 and that it was entitled to costs on appeal (*Stockton Theatres, Inc. v. Palermo*, 121 Cal.App.2d 616 [264 P.2d 74]).

On the appeal in the restitution case, Stockton Theatres argued that it was entitled to a total amount of $130,000. The bond premium necessary for a sufficient bond to preserve its attachment during the pendency of the appeal amounted to a total sum of $6,980.49. When the remittitur came down, Stockton Theatres filed its memorandum of costs and disbursements on appeal; Palermo objected to the inclusion of the bond premium as an item of costs. The trial court granted Palermo's motion to tax costs on appeal as to this item on the ground that section 1035 of the Code of Civil Procedure did not apply at the appellate stage (*Stockton Theatres, Inc. v. Palermo*, 47 Cal.2d 469 [304 P.2d 7]).*

*The above brief resume of this litigation is taken from our opinion in 47 Cal.2d 469. A more complete statement will be found in our opinion in *Palermo v. Stockton Theatres, Inc.*, 32 Cal. 2d 53 [195 P.2d 1].

Section 1035 of the Code of Civil Procedure provides: "Whenever in this code or by other provision of law costs are allowed to a party to an action or other proceeding, such costs shall include the premium on any surety bond which was procured by the party entitled to recover costs in connection with the action or proceeding *unless the court determines that the bond was unnecessary.*" (Emphasis added.) We reversed and the "trial court [was] directed to determine the necessity for the bond required to preserve the attachment pending appeal; and, if it is determined that such bond was necessary, allow the amount of the premium paid therefor as an item of the costs on appeal to which plaintiff is entitled. The amount so allowed to be a lien upon any property of Palermo covered by the attachment heretofore levied." (47 Cal.2d 469, 478, 479.)

Thereafter, the trial court, after taking evidence, determined that a bond was unnecessary "for the preservation of the attachment on appeal and the amounts of premium thereon is not a proper item of costs on appeal. . . ." Plaintiff then prosecuted this appeal.

[1] Inasmuch as section 946 of the Code of Civil Procedure specifically states that "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him . . ." it appears that the trial court could not have meant that such bond was unnecessary "for the preservation of the attachment on

appeal . . ." but intended to say that the bond was unnecessary because of defendant Palermo's financial standing.

The record at the last hearing shows that Palermo testified that on the day (August 10 or 11, 1948) Stockton Theatres filed its complaint in restitution he withdrew $27,000 from one bank account and took the money to Reno, Nevada, where he placed it in a safety deposit box; that he also withdrew over $10,000 from another bank account and took the money to Nevada; that the money was placed in the Reno safety deposit box for "protection"; that he opened two bank accounts in Stockton in his brother's name; that his brother was mentally incompetent; that his own name was on the accounts as "agent" and that he was the only one entitled to make withdrawals therefrom; that his brother had nothing whatsoever to do with the accounts; that he told his brother he was depositing in his name "to protect my interest so that I couldn't get any attachments slapped to me. . . ." In answer to the question "Why do you keep the bank accounts in the Bank of America in your brother's name?" Palermo replied: "Protection. I never know when I am going to be attached." When asked by whom he might be attached, he replied: "Well, by anybody." The record shows that Mr. Palermo was extremely vague as to what happened to the money he had placed in the Reno safety deposit box; that he didn't "believe" he had ever deposited it in a California bank; that he used some of it to pay the judgments against him; that he had to borrow

$20,000 from a bank to pay the judgments; that he had to put up stocks of his as collateral; that the judgment was paid by check drawn on the brother's account which he signed as "agent." The record shows, through the testimony of an officer of the bank, that the savings account was opened by Palermo in his brother's name with an initial deposit of $15,000; that the highest balance was $15,378; that the checking account in the brother's name was opened in 1950 with an initial deposit of $1,000; that the March, 1954 balance in the checking account was $3,329.11.

With respect to the real property owned by him, Palermo testified that the Star Theater was built in approximately 1930; that he inherited it from his father in 1941; that it was appraised for inheritance tax purposes at $33,000; that in 1951 the theater had a value of $110,000; that he based his valuation on the building on "what the monthly rent" would be; that the monthly rent from the whole building would run "over a thousand dollars"; that his reason for placing this valuation on the theater was that it had a seating capacity of 530; that he placed a rental valuation of $1.75 per month per seat and multiplied by the number of seats; that his reason for using the $1.75 per seat figure as a reasonable rental was that "I believe a couple years back I read it in the Box Office Magazine. They determine it that way. It is a theater magazine, I receive it. We always gave—I receive two different agazines. And there was a writeup in there." When asked if that was the only basis for his opinion that the reasonable rental value per seat was

$1.75 he replied, "Yes, that is." Palermo also testified that the theater building included a candy store for which he received $100 per month rent, and a bar for which he received $80 a month rent; and that although his estimate of the reasonable rental value of the theater would amount to $927.50 per month (530 x $1.75), he had received between $300 and $360 per month rent from Stockton Theatres, Inc.

Palermo testified that the theater business, as distinguished from the real property, had a value of $60,000 in 1951; that he had no basis for this valuation; that someone (he was not sure who) had made him an offer to buy it at that time for that amount; that "The business itself has no value whatsoever unless there is a lease so that the person who buys the business can actually occupy the place of business and operate it as a motion picture theater"; that to *him* it had a "very large value, that business does"; that at the time he left Stockton in 1948, after the filing of the restitution action, all the equipment, seats and furnishing of the Star Theater were in the name of Ray Rowen; that he had an arrangement with Rowen for buying it back; that he paid Rowen "about" $25 a month rental for the seats, equipment and furnishings.

Concerning the home owned by him, Palermo testified that in 1951 it was worth $10,000; that he sold it in 1955 for that amount; that he didn't know whether it had increased in value or not.

It will be recalled that in 1948 when Stockton Theatres brought the action for restitution it claimed

it was entitled to the sum of $130,000 from Palermo. It appealed from the judgment of the trial court still contending it was entitled to that sum. Section 946 of the Code of Civil Procedure provides that an appeal does not continue in force an attachment unless the appellant procures a bond in double the amount claimed by him (see our opinion, *Stockton Theatres, Inc. v. Palermo*, 47 Cal.2d 469, 472, 473 [304 P.2d 7]). [2] Section 1035 of the Code of Civil Procedure provides that the cost of such a bond shall be included as a cost allowed to a party entitled to costs "unless the court determines that the bond *was* unnecessary." (Emphasis added.) It will be noted that the Legislature used the word "was," thereby declaring its intention that the necessity for the bond be measured as of the time of perfecting the appeal. Judgment was entered in the restitution action on April 27, 1951; Stockton Theatres filed its notice of appeal on June 7, 1951. The District Court of Appeal opinion in which the judgment was modified so as to increase it by the sum of $32,333.14 was rendered on November 30, 1953. [3] Although Palermo testified that in 1951 the money had been removed from the Nevada safety deposit box and "returned to the State of California" no bank account owned or controlled by him reflects it, and it will be recalled that he testified that he did not "believe" he had ever deposited the money in a California bank. It will also be recalled that he continued to carry money in accounts in his incompetent brother's name so as to avoid attachments. It will also be recalled that at no time pertinent to this in-

quiry did either of these accounts contain sufficient sums to protect plaintiff had it recovered the sum claimed to be due it. The record further shows that Palermo owned, during this time, only the one-story brick building, and a home with an estimated value of $10,000. In view of his admissions that he removed his money to Nevada to "protect" it, that he carried other money in his brother's name to avoid attachments from *any* source, that he had sold all the theater equipment, furnishings, et cetera, to another person, it appears to us as a matter of law that the bond procured by plaintiff was necessary within the meaning of section 1035 of the Code of Civil Procedure.

Palermo earnestly argues that because plaintiff filed its notice of appeal 41 days after both giving and receiving notice of entry of judgment in the restitution case the bond was ineffective as a matter of law by reason of the provisions of section 946 of the Code of Civil Procedure. That section, in addition to providing that an appeal does not preserve an attachment unless a bond is procured by the appellant as heretofore noted, provides ". . . and unless, *within five days* after written notice of the entry of the order appealed from, such appeal be perfected." This same argument was made by Palermo to the District Court of Appeal in *Stockton Theatres v. Palermo,* 109 Cal.App.2d 616, 617 [241 P.2d 54], where he sought to have terminated and discharged plaintiff's attachment on the ground that plaintiff's appeal was not filed within the time permitted by section 946 of the Code of Civil Procedure. The court there denied Palermo's motion to

vacate the attachments. Although the District Court of Appeal erroneously construed the effect of section 946 (see *Stockton Theatres, Inc. v. Palermo,* 47 Cal. 2d 469, 474 [304 P.2d 7]), we held that portion of its opinion was dictum and not the law of the case. We said "In the instant case the court presupposed a situation for the purpose of illustrating its theory of how the statute should be construed. The illustration was clearly erroneous *and it is obvious that the decision was not predicated upon the court's construction of the statute.* Hence, we are not bound to follow the District Court's erroneous interpretation of the scope of section 946 of the Code of Civil Procedure under the doctrine of the law of the case". (Emphasis added) We also said "*If,* as previously set forth, the District Court believed that the lien of attachment had 'merged with the judgment [and] said section [946] has no applicability,' it would appear that defendants' motion to discharge the attachment should have been granted rather than denied." There is no merit to Palermo's argument in this respect since the holding of the District Court of Appeal has long since become final.

Having concluded as a matter of law that the record shows that a bond was necessary to preserve the attachment within the meaning of section 1035 of the Code of Civil Procedure, the order is reversed with directions to the trial court to allow the premiums on said bond as a cost on appeal.

Gibson, C. J., Traynor, J., and Spence, J., concurred.

SCHAUER, J., Dissenting.—In *Stockton Theatres, Inc. v. Palermo* (1956), 47 Cal.2d 469, 477 [10] [304 P.2d 7], we declared that "Having concluded that section 1035 of the Code of Civil Procedure permits as an item of costs on appeal the premium on a bond where one is required by law (Code Civ. Proc., § 946) in order to preserve an attachment, the cause must be reversed and remanded for a *determination by the trial court* as to *whether* or not a *bond* was *necessary* in the case under consideration." (Italics added.) The order taxing costs was reversed and the trial court "directed to *determine the necessity for the bond required* to preserve the attachment pending appeal, and, *if it is determined that such bond was necessary,* allow the amount of the premium paid therefor as an item of the costs on appeal to which plaintiff is entitled." (Pp. 478-479 of 47 Cal.2d; italics added.)

Following a hearing, including the taking of evidence, the trial court "DETERMINED that under the law and evidence it was unnecessary to file the corporate surety bond herein for the preservation of the attachment on appeal and the amount of premium thereon is not a proper item of costs on appeal." I believe that the trial court's determination, made pursuant to our express direction, is supported by the record and that we should uphold it.

This was an action brought by plaintiff for restitution of the theatre, in which plaintiff recovered judgment in the trial court for $13,658.75. An abstract of that judgment against defendant was recorded in the office of the county recorder of the county (San

Joaquin) in which the theatre (which defendant owns) is located. Both parties appealed from the judgment, with plaintiff claiming it was entitled to recover its entire demand of $130,000. It appears that the bond posted by plaintiff to preserve its attachment on appeal was in double the amount (see Code Civ. Proc., § 946) of $116,341.25 ($130,000 claimed by plaintiff, less $13,658.75 covered by the recorded abstract of judgment), and the bond premium of $6,980.49 which plaintiff now seeks to have taxed to defendant as one of the costs on appeal was based on such doubled amount. However, although plaintiff prevailed on the appeal, it prevailed to the extent of an increase *of only* $32,333.44 over its trial court judgment of $13,658.75, and *not to the extent* of the $116,341.25 increase which it had claimed on appeal and on which (doubled) the bond premium was based. (See *Stockton Theatres, Inc. v. Palermo* (1953), 121 Cal. App.2d 616, 632 [264 P.2d 74].) Thus the sum of $32,333.44 won by plaintiff on the appeal was the only claim with respect to which it was justified in fairness and in law to claim and recover "necessary" costs on appeal. Otherwise there would seem to be no reasonable limit in the amount which might be claimed against a defendant whose property has been attached on a claim however grossly in excess of the actual recovery by plaintiff on appeal. If plaintiff here had recovered only an additional $100 on the appeal, rather than $32,333.44, under the majority opinion it apparently would still be considered "necessary" as a matter of law that plaintiff preserve its attachment

by a bond in double the amount of $116,341.25. The majority must consider the entire amount to be necessary as a matter of law because they reverse the trial court's findings on the evidence and remand the cause "with directions to the trial court to allow the [entire amount of] premiums on said bond." Surely a defendant should not be taxed with the premium incident to maintaining such an excessive claim.

In *Moss v. Underwriters' Report, Inc.* (1938), 12 Cal.2d 266, 274-275 [9-12] [83 P.2d 503], it was pointed out that the statute (Code Civ. Proc., § 1033) which provides that a successful litigant furnish a memorandum of his costs and "necessary disbursements" in the action "does not contemplate that a defendant must pay all of the successful plaintiff's expenses in connection with the litigation," and that "the right to reimbursement for expenses depends upon the statutory provisions concerning costs and not upon the necessity, in the mind of the litigant, or his counsel, for the outlay." (See also *Simms v. County of Los Angeles* (1950), 35 Cal.2d 303, 319 [217 P.2d 936].) In the present case, the necessity, in the mind of plaintiff or his counsel, of maintaining an additional claim on appeal in the amount of $116,341.25 does not warrant taxing defendant as a matter of law with the cost thereof when plaintiff was successful to the extent of only $32,333.44.

Further, from testimony of defendant, which the trial court was free to accept as true, defendant owned during the period here involved unencumbered real property of a value in excess of $100,000 upon which

plaintiff's judgment was a lien following recording of the abstract thereof. This evidence is plainly sufficient to support that court's implied finding that plaintiff's security for its total recovery of nearly $46,000 ($13,658.75 original judgment, plus $32,333.44 additional recovery on appeal) was ample, and that court's determination that the surety bond to preserve the attachment on appeal was wholly unnecessary. Section 1035 of the Code of Civil Procedure provides that the premium on the bond is not recoverable as costs if the court "determines that the bond was unnecessary." Pursuant to this court's direction, the trial court upon sufficient evidence has made its determination and I would uphold it and affirm the order appealed from.

Shenk, J., and McComb, J., concurred.

In the Supreme Court of the State of California

Sac. No. 6829

Stockton Theatres, Inc. (a corporation),
Plaintiff and Appellant,

vs.

Emil Palermo and Forrest E. Macomber,
Defendants and Respondents.

On Appeal from the Superior Court
in and for the County of San Joaquin
Superior Ct. #44229-44434

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and sigular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that having concluded as a matter of law that the record shows that a bond was necessary to preserve the attachment within the meaning of section 1035 of the Code of Civil Procedure

THE ORDER

of the Superior Court in and for the County of San Joaquin in the above entitled cause, be and the same

is hereby reversed with directions to the trial court to allow the premiums on said bond as a cost on appeal.

APPELLANT TO RECOVER COSTS ON APPEAL

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 19th day of December, 1958, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 19th day of January, A.D. 1959.

(Seal)

William I. Sullivan, Clerk,
By R. Formichi, Deputy.

Filed January 20, 1959,
R. E. Graham, Clerk,
By F. R. Stanley, Deputy.

Appendix B

(Vol. 47 A.C. 473.)

[Sac. Nos. 6600, 6732. In Bank. Dec. 7, 1956.]
(Two Cases.)

STOCKTON THEATRES, INC. (a Corporation), Appellant, v. EMIL PALERMO et al., Respondents.

[On hearing after decision by the District Court of Appeal, Third Appellate District, Civ. Nos. 8796, 8833 (141 A.C.A. 191, 296 P.2d 361) reversing orders of the superior court. Orders reversed.]

[1] **Attachment—Proceedings in Principal Action—Appeal.**—Code Civ. Proc., § 946, declaring that an appeal does not continue an attachment in force unless an undertaking be executed and filed by appellant, applies to a situation where plaintiff, who has recovered a smaller amount than that sued for, appeals from the judgment to an appellate court. (Disapproving *Stockton Theaters v. Palermo*, 109 Cal.App.2d 616, 619, 241 P.2d 54.)

[2] **Appeal—Law of Case—Obiter Dictum.**—The discussion or determination of a point not necessary to the disposition of a question that is decisive of an appeal is generally regarded as obiter dictum and not as law of the case.

[3] **Id.—Law of Case—Obiter Dictum.**—The Supreme Court is not compelled to follow as law of the case the District Court of Appeal's erroneous interpretation of the scope of Code Civ. Proc., § 946, relating to the effect of an appeal on an attachment, where such interpretation was obiter dictum. (Disapproving *Stockton Theaters v. Palermo*, 109 Cal.App.2d 616, 619, 241 P.2d 54.)

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[2] See **Cal.Jur.2d**, Appeal and Error, § 698; **Am.Jur.**, Appeal and Error, § 996.

[4] **Statutes—Construction—Exceptions.**—Generally, a court is not authorized in the construction of a statute to create exceptions not specifically made.

[5] **Costs—Items Allowable—Bond Premiums.**—Code Civ. Proc., § 1035, which permits the premium on any surety bond to be included as an item of costs to the party to whom costs are allowed, was intended to include the cost of a bond premium at both the trial and appeal stages; it does not repeal Code Civ. Proc., § 1034, relating to costs on appeal, but merely adds an additional item of recoverable costs to those set forth in Rules on Appeal, rule 26(c).

[6] **Courts—Judicial Council.**—Code Civ. Proc., § 961, relating to rules on appeal in civil actions and proceedings, does not provide that the Judicial Council shall have the power to prescribe all rules for the practice and procedure on appeal, although it provides that after the effective date of the Rules on Appeal all laws in "conflict therewith shall be of no further force or effect."

[7] **Costs—On Appeal—Items Allowable.**—The Legislature has the power to enact, subsequent to the effective date of the Rules on Appeal, a statute which would have the effect of amending Rules on Appeal, rule 26(c), listing additional items of costs to be recovered on appeal.

[8] **Courts—Judicial Council.**—The rule-making power of the Judicial Council is limited by existing law, the Constitution reserving to the Legislature and the people the primary and higher right to provide rules of procedure for courts with the secondary right in the Judicial Council, to adopt rules only when and where the higher authority of the Legislature and the people has not been exercised.

[9] **Costs—What Law Governs.**—Costs are given only by statutory direction and their allowance depends on the terms of

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[4] See **Cal.Jur.**, Statutes, § 120; **Am.Jur.**, Statutes, § 432 et seq. **McK. Dig. References**: [1] Attachment, § 55; [2, 3] Appeal and Error, § 1328; [4] Statutes, § 139; [5, 10] Costs, § 36; [6, 8] Courts, § 7; [7] Costs, § 61; [9] Costs, § 3; [11] Appeal and Error, § 110; [12] Judgments, § 515.

the statute in force at the time of accrual of the right to have them taxed, and a rule pertaining to allowance of costs may be changed or modified by statute during pendency of the proceeding.

[10] **Id.—Items Allowable—Bond Premiums.**—Code Civ. Proc., § 1035, which permits the premium on any surety bond to be included as an item of costs to the party to whom costs are allowed, includes the qualification "unless the court determines that the bond was unnecessary," and the court's order disallowing the cost of a bond premium on the ground that such a cost was not specified in Rules on Appeal, rule 26(c), and that Code Civ. Proc., § 1035, did not apply at the appeal level, was not a finding that the bond was unnecessary, and in the absence of such a finding the cause on appeal should be reversed with directions that the trial court determine whether or not a bond was necessary.

[11] **Appeal—Right of Review—Loss of Right—Acceptance of Benefits.**—A judgment creditor may accept a tender of that portion of the judgment favorable to him and to which he is admittedly entitled without losing his right to appeal from a severable portion of the judgment unfavorable to him.

[12] **Judgments—Satisfaction.**—An order granting defendant's motion to enter satisfaction of judgment and to release all attachments was error where the court did not take into consideration the amount of a bond premium, which was the subject of a pending appeal, and where defendant did not give an undertaking under Code Civ. Proc., §§ 554, 555, for release of attachment in the amount of costs demanded by plaintiff.

APPEALS from orders of the Superior Court of San Joaquin County granting motions to retax costs on appeal and to enter satisfaction of judgment, discharge liens created by the recording of abstracts of judgment and to release all levies of attachment or

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[12] See **Cal.Jur.2d**, Judgments, § 319 et seq.; **Am.Jur.**, Judgments, § 862 et seq.

execution. Thomas B. Quinn and George F. Buck, Judges. Reversed.

Freed & Freed, Eli Freed and Eugene A. Mash for Appellant.

Smith & Zeller for Respondent Palermo.

CARTER, J.—Stockton Theatres, Inc., appeals from two orders (1) that portion of an order retaxing costs filed on December 17, 1954, which granted the motion of defendant Palermo to retax costs as to the premiums on a surety bond to preserve an attachment on appeal; (2) from a minute order of January 27, 1955, granting the motion of defendant Palermo to enter satisfaction of judgment and to discharge the liens created by the recording of abstracts of judgment and to release all levies of attachment or execution.

On June 5, 1944, Emil Palermo, the owner and lessor of the Star Theatre in Stockton, brought an action for declaratory relief against the lessee, Stockton Theatres, Inc., in an endeavor to have the lease declared void because the stockholders of the lessee were Japanese nationals. On June 11, 1945, the lease was declared void. Immediately thereafter Palermo brought an action for forcible detainer and a judgment was rendered in his favor whereby he obtained possession of the theater. Stockton Theatres appealed from both judgments. The judgment in the declaratory relief action was reversed by this court in *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53 [195 P. 2d 1]. This had the effect of adjudicating that the lease was valid and that under it Stockton Theatres

was entitled to possession of the theater as a tenant thereof.

Stockton Theatres then brought an action for restitution. During the pendency of the first appeals Palermo had operated the theater profitably and Stockton Theatres asked that he be compelled to account to it for the income he had derived therefrom. The trial court took an account and adjudged that Stockton Theatres recover from Palermo the sum of $13,658.75. Both parties appealed. The appeal was decided in favor of Stockton Theatres and the judgment of the lower court was modified to provide that Stockton Theatres recover the sum of $45,992.12 rather than the sum of $13,658.75 and that Stockton Theatres was entitled to recover costs on appeal. (*Stockton Theatres, Inc. v. Palermo,* 121 Cal.App.2d 616 [264 P.2d 74].*).

Stockton Theatres levied an attachment concurrently with the filing of the action for restitution. After the judgment was rendered against Palermo and prior to filing notice of appeal, Stockton Theatres filed an undertaking to preserve the attachment on appeal. Palermo then moved to discharge the attachment on the ground that Stockton Theatres had not complied with the time limitation of section 946 of the Code of Civil Procedure. The motion was denied in *Stockton Theatres, Inc. v. Palermo,* 109 Cal.App.2d 616, 619 [241 P.2d 54] (no petition for hearing), where the court had this to say: "Defendants'

*A detailed statement of the history of the litigation may be found in 32 Cal.2d 53 [195 P.2d 1] and 121 Cal.App.2d 616 [264 P.2d 74].

second motion, which is predicated upon their interpretation of said section 946 of the Code of Civil Procedure as to its applicability to the situation here presented, does not appear to be well founded. In the instant case plaintiff was the prevailing party in the trial court. Had the situation been reversed, that is, if the judgment had been in favor of Palermo, and had plaintiff sought to appeal, then the situation would have come squarely within the statute cited and relied upon by defendants. *However, such is not the case, and since the lien of attachment has now merged with the judgment said section has no applicability.*" (Emphasis added.) It appears that the court in the last cited case was of the opinion that because Stockton Theatres had recovered a portion of its demand in the trial court (even though it later appealed on the ground that it was entitled to recover the full amount of its demand) the section was inapplicable. Section 946 provides in part that: "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the *appellant* by at least two sureties, in double the amount of the debt claimed by him, that the *appellant* will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected." (Emphasis added.)

On the appeal in the restitution case, Stockton Theatres argued that it was entitled to $116,341.25.

The bond premium necessary (in accordance with section 946, Code of Civil Procedure) for a sufficient bond to preserve the attachment during the pendency of the appeal amounted to a total sum of $6,980.49. When the remittitur came down, Stockton Theatres filed its memorandum of costs and disbursements on appeal. This memorandum included the amount of $6,980.49 for premium on the bond to preserve the attachment on appeal. Palermo objected to the inclusion of the bond premium as an item of costs. The court granted Palermo's motion to tax costs on appeal as to this item on the ground that section 1035 of the Code of Civil Procedure did not apply to costs on appeal. An offer of costs less the amount of the bond premium as full satisfaction was refused by plaintiff. Palermo then moved to require Stockton Theatres to release the attachment and enter a satisfaction of judgment; Stockton Theatres objected on the ground that there was unpaid interest due on the judgment owing it, and on the ground that an appeal had been taken by it from the order retaxing costs. At the hearing on Palermo's second motion the interest due Stockton Theatres was paid by Palermo. Subsequently a written order was entered granting Palermo's motion that satisfaction of judgment be entered in the action; that the levy of attachment be released and that the liens created by recordation of abstracts of judgment be discharged.*

As a preliminary matter Palermo's argument concerning the "law of the case" must be discussed.

*This matter will be discussed.

[1] It will be recalled that the District Court of Appeal in *Stockton Theaters, Inc. v. Palermo*, 109 Cal.App.2d 616, 619 [241 P.2d 54], held that section 946 of the Code of Civil Procedure had no application to a situation where a *plaintiff* who has recovered a smaller amount than that sued for, appeals from the judgment to an appellate court. Section 946 is not so limited. It provides that "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the *appellant* by at least two sureties, in double the amount of the debt claimed by him, that the *appellant* will pay all costs and damages which the *respondent* may sustain. . . ." etc. It therefore clearly appears that the statement in the opinion of the District Court of Appeal is incorrect. Palermo argues here that because of the holding which he contends has become the law of the case, Stockton Theatres has no legal authority to seek the cost of the premium on the bond as an item of costs on appeal. It seems that for the purposes of the law of the case, the statement heretofore referred to which held that section 946 was only applicable where the defendant had prevailed in the trial court may be considered dictum. The court concluded as follows: "The motion to vacate the attachments is denied, and as previously noted, the motion to dismiss plaintiff's appeal is deferred, to be considered and determined together with the appeal on its merits." *If*, as previously set forth, the District Court believed that the lien of attachment had "merged with the judgment [and] said section [946]

has no applicability," it would appear that defendants' motion to discharge the attachment should have been granted rather than denied. This could, however, apply only insofar as the judgment went—to the sum of $13,658.75 awarded to plaintiff. [2] The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum and not as the law of the case. We held in *Allen v. California Mut. Bldg. & Loan Assn.*, 22 Cal.2d 474, 489 [139 P.2d 321], that "This discussion is obviously based upon the erroneous assumption that the presentation of a claim by the investor was still required under the 1935 amendment, and this in spite of the inclusion of the words 'without presenting a claim' in the statute. And the doctrine of the law of the case does not require this court to follow an interpretation which is clearly obiter dictum. The statement of facts in the discussion, assumed for the purpose of illustrating the necessity of the court's construction of the statute, presupposes a situation. . . ." [3] In the instant case the court presupposed a situation for the purpose of illustrating its theory of how the statute should be construed. The illustration was clearly erroneous and it is obvious that the decision was not predicated upon the court's construction of the statute. Hence, we are not bound to follow the District Court's erroneous interpretation of the scope of section 946 of the Code of Civil Procedure under the doctrine of the law of the case. (See also *Hammond v. McDonald*, 49 Cal. App.2d 671 [122 P.2d 332]; 4 Cal.Jur.2d, §698, p. 604;

Millsap v. Balfour, 158 Cal. 711 [112 P. 450]; *Mulford v. Estudillo,* 32 Cal. 131.) In order to avoid confusion the holding of the District Court of Appeal in this respect is specifically disapproved.

Section 961 of the Code of Civil Procedure, which became effective in 1943, provides that "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State. . . .

"The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no further force or effect."

Section 1034 of the Code of Civil Procedure provides that "In appeals from the superior and municipal courts, costs shall be awarded as provided in rules adopted by the Judicial Council. . . . The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal. . . ." (Stats. 1945, ch. 40, § 5.)

Section 26(c) of the Rules on Appeal (36 Cal.2d 22, 23) lists certain costs which may be recovered. The premium paid on a bond to preserve an attachment on appeal is not one of the items of costs listed.

Section 1035 of the Code of Civil Procedure, which was added to the Code in 1951 (Stats. 1951, ch. 1327, § 1) provides: "Whenever in this code or by other provision of law costs are allowed to a party to an

action or other proceeding, such costs shall include the premium on any surety bond which was procured by the party entitled to recover costs in connection with the action or proceeding unless the court determines that the bond was unnecessary."

Section 1035 has, apparently, never before been construed by an appellate court. Stockton Theatres argues that it is a general provision and applies to the appellate stage of a proceeding as well as to the trial stage; Palermo contends that it applies only to the trial stage and that Rule 26(c) of the Rules on Appeal is the exclusive measure of the costs which may be recovered on appeal. Stockton Theatres argues that the Legislature had the power to adopt section 1035 and that it superseded any rule in conflict with it. Palermo concedes that the Legislature had the power to provide in section 1035 that the premium on a surety bond was a proper item of costs on appeal, but argues that it did not do so because the appeal stage was not specifically set forth in the section. The statute is general—it specifies neither the trial nor appeal stage of an action or proceeding. **[4]** The general rule is that a court is not authorized in the construction of a statute, to create exceptions not specifically made. If the statute announces a general rule and makes no exception thereto, the courts can make none. (22 Cal. Jur., § 120, p. 743; *Gagliardo v. Hoberlin*, 18 Cal. 394, 396; *Los Angeles Ry. Corp. v. Los Angeles County Flood Control Dist.*, 78 Cal.App. 173 [248 P. 532]; *In re Goddard*, 24 Cal.App.2d 132 [74 P.2d 818]; *In re De Neef*, 42 Cal.App.2d 691 [109 P.2d 741]; *Adams*

v. Herman, 106 Cal.App.2d 92 [234 P.2d 695]; *People v. Clark,* 106 Cal.App.2d 271 [235 P.2d 56]; *Certified Grocers of Calif., Ltd., v. St. Board of Equalization,* 100 Cal.App.2d 289 [223 P.2d 291].)

[5] It appears to us that the Legislature intended, by the enactment of section 1035 of the Code of Civil Procedure in 1951 to include the cost of a bond premium at both the trial and appeal stages. In so holding, section 1035 does not repeal section 1034 as contended by Palermo, but merely adds an additional item of recoverable costs to those set forth in Rule 26(c) of the Rules on Appeal. [6] Section 961 of the Code of Civil Procedure does not provide that the Judicial Council shall have the power to prescribe all the rules for the practice and procedure on appeal, although it does provide that after the effective date of the Rules on Appeal all laws in "conflict therewith shall be of no further force or effect." [7] It cannot seriously be argued that the Legislature does not have the power to enact, subsequently, a statute which would have the effect of amending the existing rule (26(c)) listing additional items of costs to be recovered on appeal. Section 1a of article VI, subsection (5), of the state Constitution provides that the Judicial Council shall "Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or that may hereafter be in force;* and the council shall submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure."

(Emphasis added.) [8] As the court said in *Lane v. Superior Court*, 104 Cal.App. 340, 344 [285 P. 860]: "The rule-making power of the Judicial Council would seem to be limited by any existing law, the Constitution reserving to the legislature and the people the primary and higher right to provide rules of procedure for our courts with the secondary right in the Judicial Council, to adopt rules only, when and where the higher authority of the legislature and the people has not been exercised."

[9] There is no merit in Palermo's contention that section 1035 is not applicable to the case at hand because Stockton Theatres' appeal was taken and the bond posted on June 7, 1951, and section 1035 did not become effective until September, 1951. We held in *Hogan v. Ingold*, 38 Cal.2d 802, 814 [243 P.2d 1, 32 A.L.R.2d 834], that " '[C]osts are given only by statutory direction and their allowance depends on the terms of the statute in force at the time of the accrual of the right to have them taxed. This time, in regard to costs on appeal, is the time of the rendition of the judgment on appeal. It follows that the rule pertaining to the allowance of costs may be changed or modified by statute during the pendency of the proceeding.' " In the case under consideration Stockton Theatres, Inc., was allowed costs on appeal by a decision rendered on November 30, 1953. (See *Stockton Theatres, Inc. v. Palermo*, 121 Cal.App.2d 616 [264 P.2d 74].)

[10] Section 1035 which permits the premium on any surety bond to be included as an item of costs to

the party to whom costs are allowed includes the qualification "unless the court determines that the bond was unnecessary." Palermo argues that the court's order disallowing the premium on the bond is, in effect, a finding that the bond was unnecessary. The trial court, however, disallowed the cost of the bond premium on the ground that such a cost was not specified in Rule 26(c), Rules on Appeal, and that section 1035 of the Code of Civil Procedure did not apply at the appeal level.

Having concluded that section 1035 of the Code of Civil Procedure permits as an item of costs on appeal the premium on a bond where one is required by law (Code Civ. Proc., § 946) in order to preserve an attachment, the cause must be reversed and remanded for a determination by the trial court as to whether or not a bond was necessary in the case under consideration.

The second appeal involved here is from the order directing the entry of a satisfaction of judgment and a release of all attachments. Stockton Theatres argues that it was entitled to rely upon its attachment for security for recovery of the bond premiums; that if defendant Palermo desired to have the levy of attachment released he could have given an undertaking under sections 554 and 555 of the Code of Civil Procedure in the amount of the costs demanded by Stockton Theatres. It is contended that a satisfaction of the judgment is the last act and the end of the proceedings (*Brochier v. Brochier*, 17 Cal.2d 822, 825 [112 P.2d 602]; *Cason v. Glass Bottle Blowers Assn.*, 113

Cal.App.2d 263 [247 P.2d 931]) and that except where a valid release is given, or there is a lawful agreement otherwise providing, a judgment may be satisfied or discharged only by payment in full with accrued interest and costs (2 Freeman on Judgments, 5th ed., p. 2329). It would appear that since the judgment creditor (Stockton Theatres, Inc.) cannot prevent the judgment debtor (Palermo) from avoiding possible liability for accruing interest, pending an appeal, by refusing tender of the amount due (*People v. Roath*, 62 Cal.App.2d 241 [144 P.2d 648]), that the trial court properly entered a satisfaction of judgment as to the amount of the judgment, interest, and the undisputed costs. However, Stockton Theatres appealed from the order retaxing costs as to the amount of $6,980.49 which was stricken by the trial court. **[11]** The judgment creditor may accept a tender of that portion of the judgment favorable to him and to which he is admittedly entitled without losing his right to appeal from a severable portion of the judgment unfavorable to him (*Stein v. Simpson*, 37 Cal.2d 79 [230 P.2d 816]). Section 554 of the Code of Civil Procedure provides, in part, that whenever any defendant has appeared in the action, "such defendant may upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment wholly, or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment, any or all of the property of such defendant

attached. . . ." Section 555 provides for the undertaking which the court or judge "must require" before making such an order.

[12] It appears that the trial court erred in releasing Stockton Theatres' attachment without taking into consideration the amount of the cost of the bond premium which was the subject of a pending appeal, and in ordering a full satisfaction of judgment. The order of the trial court would have been correct had defendant complied with sections 554 and 555 of the Code of Civil Procedure as heretofore set forth.

For the reasons heretofore set forth the orders appealed from are reversed and the trial court directed to determine the necessity for the bond required to preserve the attachment pending appeal, and, if it is determined that such bond was necessary, allow the amount of the premium paid therefor as an item of the costs on appeal to which plaintiff is entitled. The amount so allowed to be a lien upon any property of Palermo covered by the attachment heretofore levied.

Gibson, C. J., Shenk, J., Traynor, J., Schauer, J., Spence, J., and McComb, J., concurred.

Appendix C

(Vol. 159 A.C.A. 602.)

[Civ. No. 9312. Third Dist. Apr. 18, 1958.]

STOCKTON THEATRES, INC. (a Corporation), Appellant, v. EMIL PALERMO et al., Respondents.

[1] **Costs—Items Allowable—Bond Premiums.**—The fact that an undertaking was required to preserve an attachment on appeal does not mean that, as a matter of law, the surety bond filed was necessary within the meaning of Code Civ. Proc., § 1035, which permits the premium on any surety bond to be included as an item of costs to the party to whom costs are allowed "unless the court determines that the bond was unnecessary"; such determination is a question of fact.

[2a, 2b] **Id.—Items Allowable—Bond Premiums.**—A finding that a corporate surety bond filed was unnecessary to preserve an attachment on appeal was supported by evidence that defendant owned unencumbered real property of a value in excess of $100,000 on which plaintiff's judgment was a lien, and hence the court did not abuse its discretion in disallowing the premium paid on such bond as an item of cost on appeal.

[3] **Id.—Items Allowable—Determination by Court.**—Where a claim is made for a disbursement the necessity for which is doubtful and the item is properly challenged by motion to tax costs, the burden is on the claimant to establish necessity for the disbursement; its allowance is within the discretion of the trial court, and if no abuse of discretion is shown its action will not be disturbed.

APPEAL from an order of the Superior Court of San Joaquin County disallowing as an item of cost on appeal the premium paid on a corporate surety bond filed to continue in force an attachment pending appeal, George F. Buck, Judge. Affirmed.

Freed & Freed for Appellant.

Smith & Zeller for Respondents.

McK. Dig. References: [1, 2] Costs, § 36; [3] Costs, § 26.

[3] See **Cal.Jur.2d**, Costs, § 30 et seq.; **Am.Jur.**, Costs, § 51 et seq.

WARNE, J. pro tem.*—This is an appeal from an order disallowing as an item of cost on appeal the premium paid on a corporate surety bond filed to continue in force an attachment pending appeal.

In this action for restitution, the appellant, Stockton Theatres, prayed for judgment in the sum of $130,000 and caused an attachment to be levied on the respondent Palermo's bank accounts and real property owned by him. Stockton Theatres received judgment in the sum of $13,658.75. Both parties appealed from the judgment. Stockton Theatres claimed on appeal that it was entitled to $116,341.25 additional and in accordance with the provisions of section 946 of the Code of Civil Procedure concurrently filed a bond in double that amount to preserve the attachment during the pendency of the appeal. The bond premiums amounted to a total sum of $6,980.49. When the remittitur came down, Stockton Theatres filed its memorandum of costs and disbursement on appeal. This memorandum included the amount of $6,980.49 for the premium on the bond to preserve the attachment on appeal as an item of cost. Palermo objected to the inclusion of the bond premium as an item of cost. The court granted Palermo's motion to tax costs on appeal as to this item on the ground that section 1035 of the Code of Civil Procedure did not apply to costs on appeal. On appeal, the order was reversed and the trial court directed "to determine the necessity for the bond required to preserve the attachment pending appeal, and, if it determined that such bond was neces-

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*Assigned by Chairman of Judicial Council.

sary, allow the amount of the premium paid." *(Stockton Theatres, Inc. v. Palermo,* 47 Cal.2d 469, 478-479 [304 P.2d 7].) Pursuant to the Supreme Court's directive the trial court, after taking evidence, determined it was unnecessary to file the corporate surety bond for the preservation of the attachment on appeal and ordered that the $6,980.49, costs of premiums, be stricken from the cost bill.

Stockton Theatres contends that it was legally necessary that a bond in double the amount of the debt claimed by it be filed in order to preserve the attachment on appeal, since section 946 of the Code of Civil Procedure in part provides:

". . . An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained."

[1] However, the fact that an undertaking was required to preserve the attachment on appeal does not mean that, as a matter of law, the surety bond filed herein was necessary within the meaning of said section 1035 of the Code of Civil Procedure. If it were, the Supreme Court certainly would have so held instead of remanding the case to the trial court for determination of the necessity of the bond. We think it clear that under the ruling of the Supreme Court in the instant case, section 1035 of the Code of Civil

Procedure must be construed as providing that the premiums on any surety bond, including one for an undertaking on attachment, may be recovered as costs unless the trial court determines, as a question of fact, that the bond was unnecessary. [2a] In the instant matter the trial court has determined that question and found that "it was unnecessary to file the corporate surety bond herein for the preservation of the attachment on appeal." While the evidence shows that Palermo withdrew large sums of money out of his bank accounts in this state and placed the money in a bank safety deposit box in Reno, Nevada, and thereafter carried his bank accounts in his brother's name to avoid attachment, it also shows that he owned unencumbered real property of a value in excess of $100,000 upon which the Stockton Theatres judgment was a lien. We believe this latter evidence is sufficient to support the findings. The trial court presumably found such security to be ample. The appellant was not required to file his surety bond but might have filed a personal bond for which no premium would have been required. *(Christenson v. Cudahy Packing Co.*, 84 Cal.App. 237, 239 [257 P. 906].) [3] Further, as stated in *Stenzor v. Leon*, 130 Cal.App.2d 729, 735 [279 P.2d 802]:

". . . It is well settled that where a claim is made for a disbursement the necessity for which is doubtful, and the item is properly challenged by motion to tax costs, the burden is on the claimant to establish necessity for the disbursement; its allowance is within the discretion of the trial court and if no abuse of

discretion is shown the action of the trial court will not be disturbed. [Citing cases]."

[2b] While the evidence is such that the trial court could have arrived at a different conclusion it does not necessarily follow that the court abused its discretion.

No other points require discussion.

The order is affirmed.

Van Dyke, P. J., concurred.

PEEK, J.—I dissent. I can attach no meaning to section 1035 other than precisely what it says, that the costs allowed to the prevailing party ". . . shall include the premium on any surety bond . . . unless the court determines that the bond was unnecessary." Nor can I attach any meaning to section 946 of the same code other than what it says, that ". . . an appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant . . ." as therein provided. Although I know of no case in this state wherein the word "unnecessary" has been defined, our courts have held that its converse, the word "necessary" may mean ". . . something which in order to accomplish a given object cannot be dispensed with . . ." (*Westphal v. Westphal*, 122 Cal. App. 379, 382 [10 P.2d 119].) Thus, in the present case for the plaintiff to accomplish the object of its attachment, to maintain the security for the judgment it had obtained, it was necessary for it, under the mandatory provisions of section 946, to execute and

file an undertaking. And since the bond was necessary, how then can it be said to have been unnecessary?

The majority, while noting the provisions of sections 946 and 1035, holds that it does not follow that a bond was required, otherwise ". . . the Supreme Court certainly would have so held instead of remanding the case to the trial court for determination of the necessity of the bond."

It is difficult for me to attribute such meaning to the words used by the Supreme Court in that opinion. Rather I take it to mean that in view of the somewhat unique wording of the exceptive clause of section 1035, all the Supreme Court was saying was that by reason of that clause the trial court was compelled to specifically find if the proceeding came within that class of case wherein a bond was not required to maintain the status quo as provided in section 946, and hence for that reason a bond would be unnecessary. Illustrative of such a case would be an appeal from a judgment quieting title wherein a bond is not required as distinguished from the present one where a bond is specifically required under section 946 to maintain the attachment. I am convinced that to give to the word "unnecessary" a meaning so broad as to include all cases and thereby give to the trial court the discretionary hindsight to conclude otherwise in a case coming squarely within the mandatory provisions of section 946 is to defeat the very purpose of section 1035.

The practical effect of the majority opinion is to say to the attorney and his client although section 946 compels you to file a bond in a proper case, neverthe-

less you do so at your peril since at some future date a judge may determine that *necessary* means *unnecessary*. It is true, as the majority says, a litigant may file a personal bond for which no premium is required. But how many persons in the first place could qualify in an action where the demand was comparable to that sought by plaintiff herein, and secondly, even if qualified persons could be found, how many would be willing to do so?

The judgment which plaintiff recovered in the original proceeding (see *Stockton Theatres v. Palermo*, 121 Cal.App.2d 616 [264 P.2d 74]) was only one-tenth of the amount which it sought. There can be little question that under the facts disclosed therein plaintiff had every reason to believe that it was entitled to a substantially greater recovery. Its judgment lien against defendants' property was somewhat in excess of $13,000, but it had no lien for the additional sum of approximately $30,000 which was allowed by this court on appeal. Furthermore during the course of the present appeal Palermo could have disposed of his real property and thereby thwarted any attempt by plaintiff to collect the full amount of its judgment. Even in the absence of any activity on the part of Palermo the property could have been destroyed through various means. In light of such possibilities and the admitted activities of Palermo in placing all possible assets beyond the reach of plaintiff, certainly its apprehensions and the necessity for a bond were more than adequately substantiated. Surely the Legislature had no intent in adopting section 1035

to place a litigant in such an impossible situation. Nor can I bring myself to the conclusion that such is the meaning of the Supreme Court decision.

However, even if the majority be correct in its holding that the portion of section 1035 here in issue casts upon the trial court the discretionary power to determine in any given case, irrespective of the provisions of section 946, as a factual question, the necessity of an undertaking to continue the attachment in force pending the appeal, the determination by the trial court herein should not be upheld. Palermo admittedly removed $27,000 from a checking account in one Stockton bank and $10,000 from a safe deposit box in another and placed the entire amount in a safe deposit box in a Reno, Nevada, bank. He was most vague as to what was ultimately done with these funds. He further testified he opened a commercial account, as well as a savings account, in the name of an incompetent brother. Except for the testimony that at one time the checking account held as much as $4,000, there was no evidence as to what transactions went through this account. Palermo gave no testimony concerning the savings account, but an officer of the bank testified that the largest balance at any one time in this account was approximately $15,000. It was Palermo's further testimony that the building which was obviously a one-purpose building, had a value of from $100,000 to $110,000 when this action was instituted in 1948; however, it was appraised at $33,000 at the time of his father's death in 1941; that the residence had a value of $10,000 in 1951, and although it

had increased in value, he sold the same in 1955 for the identical amount. Additionally it should be noted that in the previous case (121 Cal.App.2d 616 [264 P.2d 74]) it appeared that Palermo had sold all of the equipment in the theater to one Rowan and had rented the same back for $25 per month.

If the bond premium was not necessary as a matter of law (as I believe it was) and hence a proper and allowable item of costs under section 1035, but to the contrary its necessity as the majority holds was a question of fact for determination by the trial court, then it would be my further conclusion that under the facts as presented to the trial court, it cannot be said that a bond was unnecessary and hence the judgment should be reversed.

Appendix D

SAC. NO.

6829

In the Supreme Court

OF THE

State of California

STOCKTON THEATRES, INC., a corporation,
Plaintiff and Appellant,

vs.

EMIL PALERMO and
FORREST E. MACOMBER,
Defendants and Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

County of San Joaquin.

Honorable George F. Buck, Judge.

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Honorable George F. Buck, Judge.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The Respondent in this case, Emil Palermo, believes that a majority of this Court in its Opinion reversing the trial court has committed gross error in many respects and that as a result of these accumulated errors, Palermo has been denied due process of law and has, likewise, been denied the equal protection of the laws under both State and Federal Constitutions.

First: The Judicial Council and various Committees of the State Bar have for many years sought to obtain for the Judicial Council the sole rule-making power on appeal, which culminated in the enactment of Section 961 of the Code of Civil Procedure in 1943. With this statute on the books, the Legislature in 1951 enacted Section 1035 of the Code of Civil Procedure. The trial court in this action applied the usual, ordinary rule of construction many times applied by this Court and interpreted C.C.P. 1035 as applying to trial court proceedings and not to appellate court proceedings, upon the theory that the Legislature knew that Section 961 of the Code of Civil Procedure existed on the books and that if it had desired Section 1035 of the Code of Civil Procedure to apply to procedure on appeal it would have clearly so stated. The trial court's interpretation of the two statutes was based on many prior decisions of this Court and left the statutes consistent with each other.

This Court, however, rejected the rule of interpretation of statutes followed by the trial court and, in effect, rejected the Legislature's offer to repose the sole rule-making power on appeal in the Judicial Council, but as to this Respondent it deprived him of the benefit of a long series of decisions and precedent that other litigants have been privileged to rely upon.

Second: A majority of this Court has, in its recent Decision, struck down a long series of decisions establishing precedent in this: This Court has repeatedly held that it was not a fact-finding body and that even under Article VI, Section 4¾ of the Constitution of

the State of California and Section 956 of the Code of Civil Procedure, this Court would not substitute its judgment on facts for that of the trial court. See:

Tupman v. Haberkern, 208 Cal. 256, 280 Pac. 970.

Not only has a majority of this Court substituted its judgment upon factual matters for that of the trial court; this Court has concluded, for example, that not only does Palermo's real property not have the value testified to by him but has determined there was no basis for Palermo's valuations, in spite of the fact that there was not one scintilla or iota of testimony to the contrary. This Court has put its own interpretations and inferences upon the testimony in this case, without ever having seen the witnesses. The rule has always been in this Court that an Order such as the one appealed from by Stockton Theatres needs no findings to support it; all intendments will be in favor of the validity of the Order appealed from, exactly the same as if this were an appeal on the judgment roll alone; *and in this case this Court has departed from all established precedent.* Palermo believes that the action of a majority of this Court is arbitrary and capricious and has deprived Palermo of the equal protection of the laws and of due process under both the State and Federal Constitutions, in that the appeals of all other persons are governed by one set of rules and Palermo's is governed by a different set of rules.

Third: The Legislature of this State has determined that there is only one (1) way in which an attachment can be continued in force on appeal, and that

is under Section 946 of the Code of Civil Procedure. That Section specifically provides that in order for said attachment to be continued in force on appeal, the appeal must be perfected within five (5) days after written notice of the entry of the order appealed from. In this case the record shows by the only documentary evidence that written notice of the entry of the judgment appealed from was given by Palermo to Stockton Theatres on April 27, 1951, and the appeal was not perfected by the filing of a Notice of Appeal until June 7, 1951—forty-one (41) days thereafter. It is abundantly clear that Stockton Theatres had no right whatsoever under the statute to continue in force the attachment on appeal in this case. When, in the Decision of this Court in 47 Cal. 2d 469, it determined that Section 946 of the Code of Civil Procedure meant exactly what it said, this Court should never have sent this case back to the trial court at all. It should have concluded as a matter of law in that Opinion that since Stockton Theatres had not complied with C.C.P. 946 and could not have continued in force its attachment on appeal, that any bond given by Stockton Theatres to continue in force an attachment on appeal was an idle, useless act and a nullity, and this Court should have determined that not only was the bond on appeal given by Stockton Theatres unnecessary, but was a senseless, useless act, and should have in that Decision affirmed the Order of the trial court on that basis alone. This Court, both in its Decision in 47 Cal. 2d 469, and the majority of this Court in its most recent Decision, has absolutely ignored this de-

cisive point and has deprived Palermo of rights that should be available to every other person in the State of California. Palermo respectfully submits that deprivation of this right constitutes an invasion by this Court of his right to due process and the equal protection of the laws under both the State and Federal Constitutions. See:

San Jose Ranch Co. v. San Jose Land and Water Co., 126 Cal. 322, and
McPhee Estate, 154 Cal. 385.

See, also:

Constitutional Law, 11 *Cal. Jur.* 2d, Sections 268, 298, 301, 306 and 308.

Fourth: A majority of this Court in the most recent decision has determined that Stockton Theatres is entitled to the premium on a bond on appeal in the amount of $232,682.50. This bond premium amounts to $6,980.49. Stockton Theatres actually recovered less than $33,000.00 additional. What this Court has held, in effect, is this: that the party taking an appeal from a judgment of a lower court can itself determine the amount of the bond premium that will be taxed to the respondent (in the event the appellant prevails on appeal) and that this Court will not determine what a fair bond or bond premium should have been. So far as the Decision of a majority of this Court is concerned, Stockton Theatres could have sued Palermo for a million dollars, in which event the bond on appeal would have been two million dollars and, at a premium of $10.00 per thousand per annum

for a period of 2 years and five months, the time the appeal was pending, the premium would have been $48,000.00. Such a Decision, leaving the amount by which Palermo shall be penalized to the sole discretion of the opposing party, is a clear deprivation of Palermo's rights to due process and the equal protection of the laws under both the State and Federal Constitutions.

Fifth: The Opinion of a majority of this Court has abstracted from the record every fact which this Court feels will not support the order of the trial court and ignores every fact which would support the order of the trial court.

The history of this litigation shows that Palermo is not a criminal in this matter. At the time he filed his Petition for a Declaratory Judgment, the Attorney General of this State was threatening to prosecute him, as well as Stockton Theatres, for a violation of the Alien Land Act, which had been at least twice held constitutional by the United States Supreme Court. The Panay incident had occurred in which the Japanese Government sank a United States gunboat and as a result thereof the Government of the United States terminated its commercial treaty with Japan; that at that time it was clearly established by decisions of the United States Supreme Court that Japanese nationals could not even lease commercial property in this State except for the provisions of the Treaty, and it had been abrogated unilaterally by the United States; Palermo was in grave danger of having his real property escheated to the State of California; the

trial Judge—Judge Woodward—declared that the lease was unlawful, it constituted a clear violation of the Alien Land Act, and it was only after the war with Japan was over that this Court reversed the decision of the trial court. In the meantime, Stockton Theatres had been operating this and other theaters, and the testimony in the trial court showed that the stockholders of Stockton Theatres were extremely well fixed financially and derived large sums of money from the operation of the theaters even while they were in internment camps. Stockton Theatres brought an attachment suit against Palermo for $130,000.00. This attachment would have tied up all of Palermo's liquid assets and deprived him of a livelihood. Palermo was under no duty to keep his money in the bank where Stockton Theatres could levy a $130,000.00 attachment on it. Every judgment against Palermo obtained by Stockton Theatres has been immediately satisfied in full. If Palermo had one million dollars in cash, Stockton Theatres could have sued him for one million dollars and tied all that up by their Writ of Attachment, and yet a majority of this Court would criticize his failure to leave his money in the bank so that Stockton Theatres could attach it.

On the record in this case, the trial court could, and Palermo believes did, determine that Stockton Theatres and its stockholders had more than sufficient assets to put up a cash bond on appeal if they had so desired. There is not one scintilla of evidence before this Court to the contrary. But the rule adopted by a majority of this Court in its most recent decision deprives

Palermo of the benefit of the rule available to other litigants but not available to Palermo.

It is respectfully submitted that this Court should grant Palermo a rehearing in this case and should sustain the action of the trial court, concurred in by two of the Justices of the Third District Court of Appeal.

In the event this Court refuses Palermo a rehearing, Palermo respectfully requests that the remittitur in this case be withheld for a period of forty-five (45) days so as to enable Palermo to seek Certiorari from the Supreme Court of the United States on the ground that he has been deprived of his right to due process and the equal protection of the laws under both the State and Federal Constitutions.

Dated, Stockton, California,
December 22, 1958.

Respectfully submitted,
FORREST E. MACOMBER,
Attorney for Respondent and Petitioner.